FILED
NOV 28 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-746 and 81-1172

In the Supreme Court of the United States

October Term, 1982

CITY OF AKRON,
Petitioner,

vs.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. *et al.*,
Respondents.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. *et al.*,
Cross-Petitioners,

vs.

CITY OF AKRON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' AND CROSS-PETITIONERS' REPLY BRIEF

STEPHAN LANDSMAN
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 44115
(216) 687-2328
(*Counsel of Record*)

LOIS J. LIPTON
Roger Baldwin Foundation of A.C.L.U. Inc.
220 South State Street
Chicago, Illinois 60604

GORDON BEGGS
American Civil Liberties Union of Cleveland Foundation, Inc.
1223 West Sixth Street
Cleveland, Ohio 44113

Attorneys for Respondents and Cross-Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

TABLE OF AUTHORITIES II
ARGUMENT 2

I. The Record Demonstrates That Free-Standing Clinics Are Medically Appropriate for the Performance of Second Trimester Abortions and Further Demonstrates the Burdens Created by an Outright Ban on Second Trimester Abortions in Such Facilities 2

II. Defendants Have Demonstrated Neither That the J.C.A.H. Hospital Requirement Imposed by Section 1870.03 Serves a Compelling State Interest nor That It Is Narrowly Drawn 4

III. Requiring Persons to Travel in Order to Exercise Their Constitutional Rights Has Been Rejected by This Court 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Doe v. Bolton, 410 U.S. 179 (1973) 6

Gary-Northwest Indiana Women's Services, Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd mem. sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr*, 451 U.S. 934 (1981) 4

Mississippi University for Women v. Hogan, ... U.S. ....., 102 S.Ct. 3331 (1982) 7

Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, 655 F.2d 848; *supplemented* 664 F.2d 687 (8th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3934 (U.S. May 24, 1981) (Nos. 81-1255, 81-1623) 2

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 4, 5

Roe v. Wade, 410 U.S. 113 (1973) 5

Shad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 7

Nos. 81-746 and 81-1172

In the Supreme Court of the United States

October Term, 1982

CITY OF AKRON,
Petitioner,

vs.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. *et al.*,
Respondents.

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC. *et al.*,
Cross-Petitioners,

vs.

CITY OF AKRON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' AND CROSS-PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE RECORD DEMONSTRATES THAT FREE-STANDING CLINICS ARE MEDICALLY APPROPRIATE FOR THE PERFORMANCE OF SECOND TRIMESTER ABORTIONS AND FURTHER DEMONSTRATES THE BURDENS CREATED BY AN OUTRIGHT BAN ON SECOND TRIMESTER ABORTIONS IN SUCH FACILITIES.*

Plaintiffs in the present case and in the case of *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft,* 655 F.2d 848; *supplemented* 664 F.2d 687 (8th Cir. 1981), *cert. granted,* 50 U.S.L.W. 3934 (U.S. May 24, 1981) (Nos. 81-1255, 81-1623), as well as amici American College of Obstetricians and Gynecologists (A.C.O.G.) and American Medical Association have detailed for this Court the scientific evidence demonstrating that second trimester abortions are safer than childbirth[1] and that such abortions may be as safely performed in free-standing clinics as in hospitals.[2]

The defendants have offered virtually no scientific evidence to support their requirement, set forth in ordi-

---

*The designations used in this Brief to refer to documents filed with this Court are those set forth in Respondents and Cross-Petitioners' Brief at 2 n. 1.

1. On the question of mortality risks see Respondents and Cross-Petitioners' Brief at 10 and materials cited therein; Brief of Amici A.C.O.G., *et al.*, at 21 and materials cited therein. (By 1977 the death-to-case rate for second trimester abortion was 6.5 per 100,000 while that for childbirth was 9.3 per 100,000.)

2. On the question of the safety of free-standing clinics see Respondents and Cross-Petitioners' Brief at 10-11 and n. 20; L. Doc. 3, p. 406, Ash. A. 85; Brief of Amici A.C.O.G., et al., at 23 and n. 64; Brief of Respondent in *Planned Parenthood v. Ashcroft* at 4-10 and testimony cited therein.

nance Section 1870.03, that all second trimester and later abortions be performed in a J.C.A.H. accredited hospital. Rather, defendants have placed almost total reliance on an A.C.O.G. requirement that was abrogated in 1982 and replaced by a specific endorsement of the performance of second trimester abortions in free-standing clinical facilities up to 18 weeks from the last menstrual period.[3] Both the American Public Health Association[4] and the Planned Parenthood Federation of America[5] have also concluded that early second trimester abortions should be permitted in free-standing clinical facilities.

The court of appeals in the present case found, and defendants do not seriously dispute, that the effect of imposing an in-hospital requirement is to force up to ten percent of women seeking abortions in Akron to travel to facilities as far away as the State of Michigan or, if travel is impossible, to face the prospect of "carrying the baby to term, attempting self-abortion or seeking illegal abortions" (Pet. A. 19a). The court of appeals also found, and defendants do not dispute, that hospitalization increases the cost of abortion by as much as $550 (Pet. A. 20a). As the court of appeals concluded "without the ability to travel and funds to pay for the hospital treatment, many of these Akron women have no real opportunity to obtain an abortion" (Pet. A. 20a).

---

3. The text of the A.C.O.G. standard is set forth as Appendix B to Respondents and Cross-Petitioners' Brief in the present case.

4. The text of the American Public Health Association standard is set forth as Appendix C to Respondents and Cross-Petitioners' Brief.

5. The text of the Planned Parenthood Federation of America standard is set forth as Appendix D to Respondents and Cross-Petitioners' Brief.

II. DEFENDANTS HAVE DEMONSTRATED NEITHER THAT THE J.C.A.H. HOSPITAL REQUIREMENT IMPOSED BY SECTION 1870.03 SERVES A COMPELLING STATE INTEREST NOR THAT IT IS NARROWLY DRAWN.

Despite finding that the J.C.A.H. hospital requirement of Section 1870.03 seriously burdens women seeking second trimester abortions, the Sixth Circuit Court of Appeals upheld the regulation. It did so exclusively on the strength of this Court's summary affirmance in *Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd mem. sub nom. Gary-Northwest Indiana Women's Services, Inc. v. Orr*, 451 U.S. 934 (1981). The Sixth Circuit's reliance on *Gary-Northwest* was based upon a misapprehension of the statutory requirement at issue in that case. Because the Indiana statute defined "hospital" to include out-patient facilities[6] *Gary-Northwest* is simply inapplicable to this case.[7] In contrast to the Indiana statutes, Section 1870.03 flatly prohibits the use of any type of out-patient facility and even prohibits hospitals from performing second trimester abortions unless they have J.C.A.H. accreditation.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), a case that defendants ignored in their discussion of Section 1870.03, this Court reviewed a Missouri regulation prohibiting the use of saline amniocentesis

---

6. The texts of the relevant Indiana statutes are set forth as Appendix B to Respondent's Cross-Petition for Writ of Certiorari.

7. As noted in Respondents and Cross-Petitioners' Brief at 40 n. 68, the summary affirmance in *Gary-Northwest* is inapplicable for at least two other reasons as well: (1) the questions presented in the jurisdictional statement were primarily procedural; (2) the district court in *Gary-Northwest* found several significant evidentiary failures not present in this case.

as a technique of abortion after the first 12 weeks of pregnancy. This Court applied the compelling interest test in that case. 428 U.S. at 76. *Danforth* concluded that the Missouri regulation was unconstitutional because saline procedures were "commonly used nationally by physicians," were safer "with respect to maternal mortality than even continuation of the pregnancy until normal childbirth," and were likely to force "a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." 428 U.S. at 78-79.

Akron's hospitalization requirement operates in the same way as the Missouri regulation. It prohibits Akron's free-standing clinics from performing early second trimester abortions by the D and E method despite the widespread use of such methods by clinics across the United States.[8] It prohibits clinics from performing abortion procedures that are far less dangerous than childbirth.[9] Finally, as found by the court of appeals, Akron's regulation forces women to pursue alternatives that significantly increase the health risks they face due to increased travel, carrying the pregnancy to term, seeking illegal abortions or attempting self-abortion (Pet. A. 19a-20a). In light of this Court's holding in *Danforth* and the failure of the defendants to provide even that quantum of evidence rejected in *Danforth*, Section 1870.03 is unconstitutional.[10]

Roe v. Wade, 410 U.S. 113 (1973), held that regulations limiting abortion must not only be justified by a

---

8. See materials set forth in Brief of Amici A.C.O.G., et al., at 25 n. 70.

9. See note 1 *supra*.

10. In addition to their failure to present sufficient evidence to support the flat prohibition of second trimester abortions in free-standing clinics, defendants themselves state at two places in their Reply Brief (at 5 and 17) that such questions should be decided on a case by case basis rather than by reliance on a flat ban.

compelling state interest but that such "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155. In *Doe v. Bolton,* 410 U.S. 179 (1973), this Court invalidated a Georgia regulation requiring that all abortions be performed in hospitals accredited by the J.C.A.H. It was noted in *Doe* that among the "optimum achievable standards" of the J.C.A.H. were requirements for a dietetic service, a written disaster plan for mass emergencies, a nuclear medical services program and a radiology program. 410 U.S. at 193 n. 12. This Court held that such requirements went far beyond any legitimate objective the state might have in the abortion context. *Id.* at 195. In the present case Akron has imposed precisely the same requirement held unconstitutional in *Doe.* Defendants in the present case have failed to demonstrate that a hospital requirement of any sort is justified, nor have they provided any evidence warranting this Court's reversal of its explicit holding in *Doe v. Bolton.* Under these circumstances it is clear that Section 1870.03 is not narrowly drawn to express only a legitimate state interest and should be held unconstitutional.

III. REQUIRING PERSONS TO TRAVEL IN ORDER TO EXERCISE THEIR CONSTITUTIONAL RIGHTS HAS BEEN REJECTED BY THIS COURT.

In their Reply Brief defendants cavalierly suggest that women denied second trimester abortions in Akron should seek them at clinics or hospitals in other localities. Defendants' Reply Brief at 3.[11] Defendants in this case

11. Apparently defendants do not question the safety of second trimester clinic abortions in localities other than Akron.

made absolutely no showing of the availability of second trimester abortion services in nearby communities. Moreover, the only evidence touching on this question indicates that Akron women are forced to travel to facilities as far away as Michigan to obtain second trimester abortions (Pet. A. 19a).

On several occasions in recent years this Court has rejected the argument that constitutional rights may be curtailed so long as they may be exercised elsewhere. Such an argument was advanced by the State of Mississippi in *Mississippi University for Women v. Hogan*, ... U.S. ....., 102 S.Ct. 3331, 3336 n. 8 (1982). This Court rejected the argument and found that compelling plaintiff Hogan to drive a considerable distance to attend nursing classes in another city "disadvantaged" him and resulted in a constitutionally cognizable burden. Similarly, in *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981), this Court rejected Mount Ephraim's argument that a broad spectrum of entertainment could be banned because it might be available elsewhere. In this case the travel argument is without merit and should be rejected.

CONCLUSION

For the foregoing reasons, as well as those previously enumerated, this Court should vacate the judgment of the court of appeals holding Section 1870.03 of the Akron ordinance constitutional and remand the issue to that court for further proceedings.

Respectfully submitted,

STEPHAN LANDSMAN
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 44115
(216) 687-2328

LOIS J. LIPTON
Roger Baldwin Foundation of
A.C.L.U. Inc.
220 South State Street
Chicago, Illinois 60604

GORDON BEGGS
American Civil Liberties Union
of Cleveland Foundation, Inc.
1223 West Sixth Street
Cleveland, Ohio 44113

Attorneys for Respondents and Cross-Petitioners